IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 66 OF 1999.

1. Shri Shashikant Bhalchandra
   Shirodkar, major.

2. Smt. Smita Shashikant
   Shirodkar, major,
   both r/o House No.463,
   Tembar vaddo, Assagao, ... Appellants.
   (Orig.Defts.)

VERSUS

Mr. Gurudas Balchandra
Shirodkar,
son of Bhalchandra Atmaram Shirodkar,
resident of House No.462,
Tembar Vaddo, Assagao,
Bardez, Goa. ... Respondent.
(Orig.Plff.)

Shri A. Kansar, Advocate for the Appellants.

Shri Sudin M.S. Usgaonkar, Advocate for the Respondent.

CORAM: N.A. BRITTO, J.

DATE: 5TH MAY, 2004.

ORAL JUDGMENT:

Heard learned Advocate Shri Kansar on behalf of the original defendants and learned Advocate Shri Usgaonkar on behalf of the original plaintiff.

2. In a suit for division of a property between two brothers namely the plaintiff and defendant No.1,a Commissioner was appointed and who submitted his Report dated 21.4.1997 along with the plan, copy of which is at page 30 of the Paper Book. After hearing both the parties, the learned Trial Court came to the

conclusion that the Report and the plan showing the property divided between both the parties was just and equitable as both the parties by the proposed division got the road namely of Assagao-Mapusa road of 9.5 metres and therefore proceeded to order the division of the property between both the said brothers as per the Report of the Commissioner and the plan submitted by him.

3. When the matter came up for hearing before this Court, it has been submitted by learned Advocate Shri Kansar that the proposed division, as per the plan of the Commissioner at page 30 of the paper book is neither just nor equitable, because the width of each parcel to be allotted to each of the parties is only 9.5 metres and this width is less than the minimum width which is required to be maintained by P.D.A. Regulations in case any development is to be carried out. Learned Advocate Shri Usgaonkar has fairly conceded that unless the width of the plot is minimum 10 metres, then development would not be possible in view of the said P.D.A. Regulations. It is therefore obvious that the division proposed by the Commissioner and accepted by the learned Trial Court, as per plan at page 30 of the paper book would not be in the interest of both the parties and particularly the interest of the plaintiff who would be deprived of

building a house thereon.

4. Shri Kansar therefore put up his own proposal for division of the property as per plan, copy of which is at page 36 of the paper book by which parcel 'D' is to be allotted to the defendants and parcel 'E' is to be allotted to the plaintiff. However, the division as per this proposal is not acceptable to the learned Advocate Shri Usgaonkar, because according to learned Advocate Shri Usgaonkar, the plaintiff will not get any road frontage to the said parcel 'E' proposed to be allotted to him.

5. Shri Usgaonkar therefore put his own proposal of division as per plan, copy of which is now placed at page 81 of the paper book. By this proposal the property is sought to be divided in four parcels, namely parcels 'B' and 'C' to be allotted to the defendants and parcels 'A' and 'D' to be allotted to the plaintiff, but this proposal is again not acceptable to learned Advocate Shri Kansar, because according to him, the plaintiff will get road frontages to both the parcels 'A' and 'D' and the defendants will be deprived of any road frontage whatsoever, their access being restricted by only three metres access shown on the said plan.

6. The most equitable division would have been in case both the parties could get a road frontage towards the said Assagao-Mapusa road. But as already seen, such a proposal becomes impracticable because the width of the parcels to be divided comes to less than 10 metres. The proposal submitted by learned Advocate Shri Usgaonkar as per plan at page 81 again does not appear to be very equitable, as rightly pointed out by learned Advocate Shri Kansar because by this proposal the plaintiff gets two plots or parcels, one on the extreme northern side and the other on the extreme southern side with road frontages though the road frontage to parcel 'D' has been disputed by learned Advocate Shri Usgaonkar. By the proposal submitted by learned Advocate Shri Kansar, as per plan at page 36, the defendants have agreed to demolish the toilet and the sceptic tank existing on the eastern side of the property of both the parties and the defendants have also agreed to keep 4 metres access from their own share. It is true that by this proposal the plaintiff will not get a road frontage of the said Assagao-Mapusa road but the plaintiff will certainly have an access of 4 metres width which has been reserved by the defendants from their own property as an access to go to parcel 'E' to be allotted to the plaintiff. In addition, the plaintiff will also have a road frontage on the northern side of

the said parcel 'E' though the existence of the said road is otherwise disputed.

7. As said before, the case at hand is not a case where the property of both the parties is not divisible. The property of both the parties has got to be divided conveniently and equitably. The house of the defendants is already existing and the same is said to have been built with the consent of the plaintiff. Considering the totality of the facts, in my opinion, the most convenient, practicable and equitable division of the property of both the parties will be as per the proposal submitted by learned Advocate Shri Kansar, as per plan which is at page 36 of the paper book.

8. In the circumstances, therefore, the judgment and decree of the learned Trial Court shall stand modified. The division of the property between both the parties shall be as per plan at page 36 of the paper book. In other words, as per the said plan parcel 'E' shall be allotted to the plaintiff and parcel 'D' shall be allotted to the defendants and the defendants shall demolish the structure of the toilet/sceptic tank, as undertaken by them and reserve the said 4 metres as access to go to parcel 'E' to be allotted to the plaintiff.

9. The appeal therefore is partly allowed and the judgment and decree of the learned Trial Court is modified. The property of both the parties shall be physically divided as per the plan at page 36 of the paper book.

N.A. BRITTO, J.

sl.